United Nations CAT/C/62/D/721/2015

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
27 March 2018
English
Original: French

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 721/2015*, **

Submitted by	J.B. (represented by counsel, Boris Wijkström and Gabriella Tau)
Alleged victim	The complainant
State party	Switzerland
Date of complaint	16 December 2015 (initial submission)
Date of decision	17 November 2017
Subject matter	Removal of complainant to Bulgaria
Procedural issues	Lack of substantiation of claims; complaint manifestly unfounded
Substantive issues	Non-refoulement; risk of torture or cruel, inhuman or degrading treatment or punishment in the event of removal to Bulgaria under the Dublin Regulation
Articles of the Convention	3, 16

1.1 The complainant is J.B., an Afghan national of Tajik ethnicity, born in 1990. He applied for asylum in Switzerland, but his application was rejected. He claims that his forced removal to Bulgaria under the Dublin Regulation would constitute a violation by Switzerland of article 3 of the Convention. He also alleges a violation of his rights under article 16 of the Convention. The complainant is represented by counsel, Boris Wijkström and Gabriella Tau.

1.2 On 18 December 2015, the Committee, acting through its Rapporteur on new complaints and interim measures requested the State party not to expel J.B. to Bulgaria while his complaint was being considered by the Committee.

1.3 On 21 December 2015, the State party informed the Committee that, in accordance with its established procedure, the State Secretariat for Migration had requested the competent authority to refrain from taking any steps to remove the complainant, who is therefore assured of remaining in Switzerland pending consideration of his complaint by the Committee.

* Adopted by the Committee at its sixty-second session (6 November–6 December 2017).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Brun, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sebastien Touze and Kening Zhang.

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The facts as submitted by the complainant

2.1 J.B. was born in 1990 in Bare Soltanpor, Nangarhar Province, in Afghanistan. After secondary school, he studied information systems and mobile telephone technology in Peshawar, Pakistan, and obtained several diplomas in that field. He then returned to Afghanistan, where he worked in his father's shop in Jalalabad for about two years. Subsequently, he started work in a semi-governmental company, Etabad Technology, in Kabul. In that company, he worked with several foreign organizations, including military bases across the country, where he installed software operating systems. After he had begun working for the company, the complainant and his family were approached by the Taliban, who demanded that he collaborate with them since he had access to military sites. The complainant and his family refused to collaborate with the Taliban and started to receive death threats. Consequently, they fled to Jalalabad, then to Pakistan, but they did not feel completely safe there owing to the sizeable presence of groups of Taliban. The complainant subsequently fled to Europe.

2.2 The complainant entered Bulgaria, where he was detained for nine months in the centre at Busmantsi. He claims that he was ill-treated during his detention: he was regularly beaten by the guards, the hygiene conditions were inadequate and he was given very little food. He was reluctant to apply for asylum in Bulgaria but did so on account of threats made by the Bulgarian authorities. He was forced to sign several documents in Bulgarian that he did not understand. After nine months in detention, he was suddenly released and taken to Sofia. He left Bulgaria and arrived in Switzerland, where he applied for asylum on 7 August 2015.

2.3 On 12 October 2015, his asylum application was rejected by the State Secretariat for Migration. The State Secretariat held that the complainant could be removed to Bulgaria, in conformity with the Dublin Regulation, since Bulgaria was the country of first asylum. It considered that, as Bulgaria was a party to the Convention relating to the Status of Refugees, the complainant would not be at risk of a violation of the principle of non-refoulement. Consequently, it did not examine the complainant's claims concerning the risks to which he would be exposed if returned to Afghanistan. As for the complainant's allegations regarding the ill-treatment he suffered in Bulgaria, it considered that the measures taken by a State to control immigration did not constitute a violation of article 3 (on torture and ill-treatment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that Bulgaria was a State that respected the rule of law and the European Union directives on the processing of asylum applications and asylum seekers, and that the complainant's removal was therefore lawful.

2.4 The complainant appealed against the decision of the State Secretariat. On 29 October 2015, the Federal Administrative Court rejected the appeal on the grounds that it was manifestly unfounded. The Court considered that, even if it was true that the complainant had applied for asylum in Bulgaria in order to avoid being detained for 18 months, that did not change the fact that he had sought asylum there and that his digital fingerprints were registered in the Bulgarian system. Consequently, Bulgaria must decide on the asylum application. Concerning the complainant's allegations of systemic failings in the Bulgarian reception system for asylum seekers, the Court considered that Bulgaria could be presumed to respect its obligations under international treaties, including the Convention against Torture and the relevant European directives, unless the complainant was able to prove otherwise. Furthermore, it considered that there was no objective justification for the complainant's fear of being returned to Afghanistan.

The complaint

3.1 The complainant maintains that his removal to Bulgaria would constitute a violation of his rights under articles 3 and 16 of the Convention.

3.2 He states that he would not have access to asylum procedures in Bulgaria and that he would therefore be subjected to refoulement to Afghanistan, where his life would be in danger because of his problems with the Taliban.[1]

3.3 The complainant also alleges that he risks being subjected to ill-treatment or torture if he is transferred to Bulgaria on account of the systemic failings of the country's reception system, particularly in the detention centres for clandestine migrants.[2] He asserts that, owing to the ill-treatment he experienced while detained in Bulgaria, he is suffering from severe depression and post-traumatic stress disorder.[3]

State party's observations on the merits of the communication

4.1 On 17 June 2016, the State party submitted its observations on the merits of the communication. The State party began by presenting a summary of the facts and general information on relevant European and Swiss law. On 7 August 2015, the complainant applied for asylum in Switzerland. At the hearing before the State Secretariat for Migration, he stated that he was an Afghan national, had received schooling and vocational training in Pakistan and had then returned to his country to work. In 2014, he reportedly left Afghanistan because of problems with the Taliban. He came to Europe, travelling through Bulgaria, among other countries, where he was arrested and placed in the Busmantsi detention centre, remaining there in deplorable conditions of hygiene, health and nutrition. Released nine months later, he was allegedly forced to provide his digital fingerprints and to file an asylum application on 18 March 2015, before being transferred to an asylum seekers' centre in Sofia. Without waiting for the decision on his asylum application, he left Bulgaria because, according to him, Afghans were generally not welcome there and could not find work. He travelled through Hungary (where he filed asylum applications on 6 and 27 May 2015), Austria (where he also applied for asylum, on 2 August 2015) and Italy, before reaching Switzerland. On 17 September 2015, the State Secretariat for Migration, having run his digital fingerprints through the central EURODAC database, which revealed that the complainant had applied for asylum in Bulgaria on 18 March 2015, requested Bulgaria to take him back. On 1 October 2015, the Bulgarian authorities agreed to the request. By a decision of 12 October 2015, the State Secretariat, noting that the complainant

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[1] The complainant cites reports on the situation in his native province, Nangarhar, which is largely dominated by the Taliban, who have carried out numerous attacks there, including in the city where he lived, Jalalabad. He refers to the "European Asylum Support Office 2015 country of origin information report on Afghanistan". The complainant also cites reports according to which Bulgarian asylum procedures do not comply with European standards. He cites, in particular, a press release on Bulgaria by the Commissioner for Human Rights of the Council of Europe and a report from the Asylum Information Database (AIDA) indicating that the rejection rate for asylum applications is very high, namely, 91 per cent for applications from non-Syrian asylum seekers.

[2] The complainant asserts that he did not apply for asylum upon entering Bulgaria. Consequently, it is likely that he was detained because he could be considered an illegal migrant. He cites several reports in support of this assertion, including a report of the Belgrade Centre for Human Rights, a non-governmental organization (NGO), which indicates that Busmantsi, the centre where the complainant was held, was known as a place in which human rights violations, including ill-treatment, were committed. A report of the Commissioner for Human Rights of the Council of Europe states that "While the 2012 report of the Committee for the Prevention of Torture (CPT) included specific recommendations to the Bulgarian Government to improve the conditions in the Busmantsi detention centre, NGOs have reported no progress in their implementation so far. Detainees in both Busmantsi and Lyubimets reportedly complained in 2014 of abusive, sometimes violent, treatment by guards, overcrowding and noise, tension among various nationality groups, the mixing of unaccompanied children with adults, dirty and insufficient toilets, inadequate ventilation and the poor quality of the food. They also indicated that they had limited means to communicate with the outside world, as well as a lack of communication with guards and other authorities" (www.openingdoors.eu/wp-content/uploads/2015/10/CommDH201512_EN.pdf).

[3] In support of his claims, the complainant has produced a medical report drawn up on 4 December 2015, according to which he is experiencing a severe depressive episode requiring intensive outpatient psychiatric treatment and medication. Removal to Bulgaria would expose him to a risk of suicide. A psychiatrist in Geneva assessed the complainant on 11 November 2015 and diagnosed him with probable post-traumatic stress disorder and a severe depressive episode without symptoms of psychosis.

had filed an asylum application in Bulgaria on 18 March 2015, found that that State was responsible for examining the application.[4] It did not therefore consider his asylum application and ordered the complainant to be transferred to Bulgaria, in accordance with article 31*a* (1) (b) of the Federal Asylum Act of 26 June 1998.

4.2 On 26 October 2015, the complainant lodged an appeal with the Federal Administrative Court against the aforementioned decision of the State Secretariat for Migration, calling for the decision to be annulled and for his asylum application to be considered. He claimed, in sum, that the reception conditions and accommodation in Bulgaria were appalling, that the situation of asylum seekers there amounted to a genuine humanitarian disaster, as was detailed in numerous international reports, and that he had been held in prison for nine months in degrading conditions, exposed to the risk of disease and to poor nutrition. By a judgment of 29 October 2015, the Court rejected the complainant's appeal. It found, inter alia, that there was no real basis for his fear of being sent back to Afghanistan by the Bulgarian authorities and that he had not presented any specific evidence to demonstrate that Bulgaria did not respect the principle of non-refoulement and would therefore fail to comply with its international obligations by returning him to a country in which his life, physical integrity or liberty would be seriously threatened or where he would be at risk of being sent to such a country. Furthermore, the Court held that the complainant had not shown that his living conditions in Bulgaria would be so difficult or harsh as to constitute treatment contrary to article 3 of the European Convention on Human Rights or article 3 of the Convention against Torture.

4.3 The State party notes that article 3 of the Convention against Torture, which is invoked by the complainant, provides that no State party should expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture (para. (1)). For the purpose of determining whether there are such grounds, the competent authorities should take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights (para. (2)). The Committee has given specific form to the elements of this article in its jurisprudence and, in particular, has issued precise instructions on the application of this provision in its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, which stipulates that the complainant must establish that there is a personal, present and serious danger of being tortured in the event of expulsion to the country of origin. The risk of torture must be assessed on grounds that go beyond mere theory or suspicion. In addition, the allegations must demonstrate that the risk is serious. Paragraph 8 of the general comment lists the information that must be taken into account in order to conclude that there is such a risk, inter alia: evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned (subparas. (a) and (d)); claims by the complainant that he or she was tortured or maltreated in the recent past, and independent evidence thereof (subparas. (b) and (c)); information on the complainant's political activities within or outside the State of origin (subpara. (e)); evidence as to the complainant's credibility (subpara. (f)); and factual inconsistencies in the complainant's claims (subpara. (g)).

4.4 The State party notes that article 16 of the Convention extends the protection against acts of torture afforded by certain provisions of the Convention to acts of cruel, inhuman or degrading treatment or punishment. In accordance with the Committee's established and explicit jurisprudence, the obligations described in article 3 of the Convention do not encompass situations of ill-treatment envisaged in article 16 of the Convention.[5] Article 3 is confined in its application to cases where there are substantial grounds for believing that the

[4] Pursuant to article 18 (1) (b) of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining Member State responsibility for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ L 180/31 of 29 June 2013, the Dublin III Regulation).

[5] See *T.M. v. Sweden* (CAT/C/31/228/2003), para. 6.2; *B.S. v. Canada* (CAT/C/27/166/2000), para. 7.4; see also Manfred Nowak and Elisabeth McArthur (eds.), *The United Nations Convention Against Torture: A Commentary*, 2008, at 183 and also 41 and 75.

author of a communication would be in danger of being subjected to torture as defined in article 1 of the Convention.[6] Accordingly, the claim under article 16 is inadmissible *ratione materiae*, as incompatible with the provisions of the Convention. The following observations concerning the possible risk of ill-treatment in the event of transfer to Bulgaria are thus made subsidiarily.

4.5 According to the State party, the complainant has not contested the fact that, since the Bulgarian authorities have agreed to the request by Switzerland to take him back, Bulgaria is competent, in principle, to examine his asylum application under article 12 (1) of the Dublin III Regulation. Concerning his removal to Bulgaria, he claims that he would not have access to fair and equitable asylum procedures there and that he would not be protected against arbitrary return to his country of origin, in violation of the principle of non-refoulement. In support of these allegations, he has produced reports on the shortcomings of the asylum procedures in Bulgaria and on the low number of non-Syrian asylum seekers granted refugee status in the country. As is clear, inter alia, from the reasoning of the Federal Administrative Court in the case, the legislation on the right to asylum is applied in Bulgaria and the asylum procedures there are not so marred by structural defects that asylum seekers have no chance of seeing their applications examined seriously, have no effective remedies or are not protected in fine against arbitrary return to their countries of origin.

4.6 The Bulgarian authorities expressly agreed to take back the complainant pursuant to article 18 (1) (b) of the Dublin III Regulation. In so doing, they acknowledged that a procedure was under way in Bulgaria and recognized their competence to process the asylum application. In this regard, it is clear from the October 2015 report of the Bulgarian Helsinki Committee, which is cited by the complainant, that persons who are removed to Bulgaria by other European Union member States have access, in principle, to asylum procedures on their return to that country; when a procedure is pending, as seems to be the case here, the asylum seeker is transferred to a reception centre. According to the complainant, his detention occurred when he was picked up by the police while in an irregular situation and before he had filed his application for asylum in Bulgaria. After the authorities had registered his application, he was released and transferred to housing for asylum seekers in Sofia. He need no longer fear, in principle, the measures of detention to which persons who enter the country clandestinely or who remain there without having the right to do so are liable.

4.7 The State party maintains that there is no real basis for the complainant's fear that the Bulgarian authorities will order him to be sent back to Afghanistan. The complainant has not presented any specific evidence to demonstrate that Bulgaria would not respect the principle of non-refoulement and would therefore fail to comply with its international obligations by returning him to a country in which his life, physical integrity or liberty would be seriously threatened or where he would be at risk of being sent to such a country. Moreover, Bulgaria is a High Contracting Party to the European Convention on Human Rights and, as such, is subject to the jurisdiction of the European Court of Human Rights. The complainant will thus be able to lodge an individual application against Bulgaria, including a request for interim measures, if he believes that he risks being removed from that country in violation, inter alia, of article 3 of the European Convention, a point noted by the European Court recently in a case similar to the present one.[7]

4.8 The State party is aware that the conditions in Bulgarian detention centres have, in some cases, been judged degrading. The European Court highlighted, in a pilot judgment, a structural problem within the Bulgarian prison system, notably on account of overcrowding and a lack of privacy and personal dignity when inmates went to the toilet.[8] In addition, the State Secretariat for Migration and the Federal Administrative Court did not dispute, in their decisions, the fact of the complainant's detention or the insalubrious conditions

[6] See general comment No. 1, para. 1; see also *S.V. et al. v. Canada* (communication No. 49/1996), para. 9.8.

[7] Letter dated 2 February 2016 from the European Court of Human Rights, annex 3.

[8] European Court of Human Rights, *Neshkov and Others v. Bulgaria*, Nos. 36925/10 and five others, 27 January 2015.

alleged by him; he did not claim, however, contrary to the assertion in his communication, that he had endured repeated physical assaults at the hands of the guards. At any event, given that the complainant was released from detention and transferred to an asylum seekers' centre in Sofia (which he reportedly left while his asylum application was still being examined), his fear of being arrested and detained again in the event of his removal to Bulgaria appears unfounded. He has provided no reason to believe that he risks being detained anew in Bulgaria, since he will be admitted there as an asylum seeker transferred under the Dublin III Regulation (his application having not yet been rejected in that country), rather than being an alien who has entered the country clandestinely or is remaining there with no legal status.

4.9 The State party notes that at no stage of the asylum procedure in Switzerland did the complainant refer to any ill-treatment suffered in Bulgaria.[9] Indeed, it is only in the complaint addressed to the Committee that he claims to have been subjected to various abuses on the part of State officials. Furthermore, the State party emphasizes that Bulgaria is a State governed by the rule of law with an operational police authority that is willing and able to offer adequate protection against assaults committed by third parties. The file contains no evidence suggesting that that would not be the case in the complainant's specific situation. It would thus be for the complainant to apply to the competent police authorities in Bulgaria if he felt that he was exposed to a specific threat in that country. Likewise, if he considered that he was being treated unfairly or unlawfully by Bulgarian officials, it would be up to him to avail himself of an effective remedy and to make his case to the competent judicial authorities. In addition, the State party asserts that the complainant has not shown that his living conditions in Bulgaria would be so difficult or harsh as to constitute treatment contrary to article 1 of the Convention or article 16.

4.10 The State party notes that, in a report dated 2 January 2014, the Office of the United Nations High Commissioner for Refugees (UNHCR) called on the States parties to the Dublin Regulation to halt temporarily all transfers of asylum seekers to Bulgaria on account of serious deficiencies in both the country's system for processing asylum applications and the reception conditions for asylum seekers. However, in April 2014,[10] after re-examining the situation, UNHCR, in an updated report, withdrew its call, noting that the reception conditions for asylum seekers in Bulgaria had improved, while drawing the attention of States to the risk of transferring vulnerable persons. The State party observes that UNHCR has not, to date, modified the position set out in its most recent report, just cited.

4.11 Other organizations continue, however, to report that serious difficulties persist in Bulgaria, notably regarding access to asylum procedures and reception conditions for asylum seekers, as well as a lack of measures to facilitate the integration of, and access to medical care for, recognized refugees or persons who have obtained temporary protection. In its October 2015 report, cited above, updating the previous year's report, in which it had noted considerable improvements in Bulgaria since March 2014, the Bulgarian Helsinki Committee observed that the situation had deteriorated, owing mainly to the influx of asylum seekers that several European States were experiencing and by which countries situated at the frontiers of the European Union were particularly affected. The Bulgarian Helsinki Committee also highlighted the inadequate material conditions in Bulgarian reception centres and the difficult conditions of detention in which numerous asylum seekers were being held, including persons returning to Bulgaria under the Dublin Regulation and families with children. In these circumstances, and even though it cannot be concluded that there are structural failings in Bulgaria, there is a need to be very mindful — depending on the facts of the case at hand — of the warning issued by UNHCR in April 2014 concerning the transfer of vulnerable persons. The State party considers, however, that, in the present case, the complainant, in the light of his personal situation and

[9] See, inter alia, the record of the hearing of 24 August 2015, annex 1, and the appeal to the Federal Administrative Court.

[10] UNHCR has not issued any new instructions since April 2014 (Bulgaria as a country of asylum: UNHCR observations on the current situation of asylum in Bulgaria, www.unhcr.org/53198b489.pdf). The Secretariat confirmed this information during a conversation on 10 October 2017 with the UNHCR chief focal point for human rights.

notwithstanding his medical problems, is not especially vulnerable and that it will be possible to meet his specific needs after his return to Bulgaria.

4.12 Regarding the complainant's state of health, the December 2015 medical report he produced attests to a severe depressive episode without symptoms of psychosis and probable post-traumatic stress disorder, requiring intensive outpatient treatment for several months. Furthermore, according to his doctor, there is a risk of suicide in the event of forced repatriation. As stated in the case law of the European Court of Human Rights, article 3 of the European Convention on Human Rights does not confer on an applicant the right to remain in a State party in order to continue to receive medical services in that State. It is only in particular cases and in very exceptional circumstances that the expulsion of an alien may constitute a violation of article 3 of the European Convention on account of the applicant's state of health.[11] Indeed, the forced return of a person with a medical condition may give rise to a violation of article 3 only if his or her illness has reached an advanced or terminal stage and he or she is near to death.[12] In particular, the risk of suicide and/or attempted suicide by a person who has been ordered to be transferred should not preclude a State from carrying out the step envisaged, provided that concrete measures are taken to prevent the threat from being realized.[13] Like the European Court of Human Rights, the Committee has also held that "only in very exceptional circumstances may a removal per se constitute cruel, inhuman or degrading treatment" (within the meaning of article 16 of the Convention) and that psychiatric fragility and severe post-traumatic stress disorder of the author do not constitute such circumstances.[14] The State party maintains that, in view of the medical report produced, no very exceptional circumstances obtain in the present case, within the meaning of the case law cited. The state of health of the complainant does not constitute an obstacle under the Convention to his removal to Bulgaria.

4.13 In addition, the State party considers it appropriate to note that the complainant's fitness to be transferred will be definitively assessed at the time that his transfer is organized. The State Secretariat for Migration will take into account the complainant's state of health at that point and will transmit the relevant information to the Bulgarian authorities, so as to ensure that he continues to receive tailored medical care in Bulgaria. Bulgaria has similar health-care infrastructure to that of Switzerland, which is sufficient to treat the conditions diagnosed in the complainant. Furthermore, that State is bound by the Reception Conditions Directive and is therefore required to provide the necessary health care, which includes, at least, emergency care and essential treatment of illness and of serious mental disorders. There is thus no evidence to suggest that the Bulgarian authorities would refuse to provide the complainant with the care he needs or would fail to afford him the required medical support such that his life or health would be seriously endangered.

4.14 The State party maintains that, for all the reasons described, the complainant has not demonstrated that there are substantial grounds for fearing that he would face a specific and personal risk of being subjected to torture or cruel, inhuman or degrading treatment if transferred to Bulgaria.

Complainant's comments on the State party's submission

5.1 On 14 November 2016, in response to the State party's observations, the complainant commented that the situation of asylum seekers in Bulgaria had deteriorated since the beginning of the migration crisis in the summer of 2015 and remained a cause for concern. In its most recent analysis on Bulgaria, UNHCR had recommended that European countries should suspend Dublin returns of vulnerable asylum seekers to Bulgaria on account of serious deficiencies in the reception conditions and asylum procedures in that country. UNHCR noted, in particular, the lack of provision for identifying vulnerable persons and for adequately addressing their needs, as well as shortcomings regarding access

[11] European Court of Human Rights, *Tatar v. Switzerland*, No. 65692/12, para. 43, 14 April 2015.
[12] European Court of Human Rights, *N. v. United Kingdom*, No. 26565/05, 27 May 2008.
[13] European Court of Human Rights, *A.S. v. Switzerland*, No. 39350/13, 30 June 2015.
[14] *M.M.K. v. Sweden* (CAT/C/34/D/221/2003), paras. 4.13 and 7.2.

to fair asylum procedures.[15] The latest report on Bulgaria from the Asylum Information Database (AIDA) confirms the worsening of the problems affecting the Bulgarian asylum system.[16] In this context, numerous European jurisdictions have suspended removals to Bulgaria, given the substantial risk of ill-treatment to which asylum seekers are exposed there. Such decisions have been taken by the courts in the United Kingdom, Germany,[17] Belgium,[18] Holland[19] and Italy,[20] among others, demonstrating the grave concerns of the European jurisdictions about respect for asylum seekers' fundamental rights in Bulgaria. The complainant considers that the case law of the European courts reflects a growing consensus around the failings of the Bulgarian asylum system, which are so serious that it is no longer able to guarantee the fundamental rights of asylum seekers.

5.2 The complainant maintains that the State party's analysis of his claim under article 16 is incorrect. In its general comment No. 2 (2007) on the implementation of article 2 by States parties, the Committee held that article 3 also applied to cruel, inhuman or degrading treatment as defined in article 16. By clarifying that the prohibition on refoulement also covered ill-treatment, the Committee aligned itself with international case law on the matter, notably that of the Human Rights Committee and the European Court of Human Rights.

5.3 Irrespective of the alleged risk of ill-treatment in Bulgaria, the complainant maintains that his removal per se would constitute a violation of article 16, given his particular circumstances. He is suffering, inter alia, from depression and post-traumatic stress disorder, linked to the ill-treatment to which he was subjected during his detention in Bulgaria. He is currently receiving specialized medical treatment in Switzerland, which would by no means be guaranteed if he were removed to Bulgaria. His removal would thus be particularly traumatizing and would have the effect of impeding in the long term, or even destroying, the possibility of a cure. For these reasons, he argues that his removal would constitute a violation of article 16.

5.4 The complainant notes that, on the one hand, the State party recognizes that there are inherent problems in the Bulgarian asylum system and certain systemic failings, although it does not specify which ones. On the other, it concludes that these problems are not so serious as to hinder access to fair and equitable asylum procedures. The complainant maintains that, in Bulgaria, access to asylum procedures in the event of a Dublin return is granted only in principle. In fact, according to UNHCR, if an asylum procedure has been terminated in absentia, it can be reopened only if there are objective reasons for the asylum seeker's absence from Bulgaria. If the person who has been transferred is unable to provide such justification to the satisfaction of the Bulgarian authorities, he or she will be deemed to be a migrant in an irregular situation and will be placed in detention with a view to his or her removal, either in Sofia (Busmantsi) or in Lyubimets, near the border with Turkey, where the conditions of detention are seriously inadequate, as attested in numerous reports

[15] UNHCR, Bulgaria as a country of asylum, April 2014, p. 17 (www.asylumineurope.org/sites/default/files/resources/unhcr_bulgaria_april_2014.pdf).

[16] AIDA, Bulgaria Country Report, October 2015 (www.asylumineurope.org/reports/country/bulgaria). For a summary of the situation, see Overview of the main changes since the previous report update, pp. 11–14.

[17] For an analysis of German case law, see European Council on Refugees and Exiles/European Legal Network on Asylum, Research Note: Reception conditions, detention and procedural safeguards for asylum seekers and content of international protection status in Bulgaria, February 2016 (available from www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Research%20Note%20-%20Reception%20conditions%2C%20detention%20and%20procedural%20safeguards%20for%20asylum%20seekers%20and%20content%20of%20international%20protection%20status%20in%20Bulgaria.pdf).

[18] See www.asylumlawdatabase.eu/en/content/belgium-council-aliens-law-litigation-suspends-dublin-transfer-bulgaria.

[19] Court of The Hague, 13 May 2016, 16/7663 and 16/7665 (www.asylumlawdatabase.eu/en/case-law/netherlands-%E2%80%93-court-hague-13-may-2016-167663-and-167665).

[20] See www.asylumlawdatabase.eu/en/content/italy-council-state-suspends-dublin-transfers-bulgaria-and-hungary.

by NGOs and international agencies.[21] It is clear from the complainant's contacts with the NGO Bulgarian Helsinki Committee that the asylum procedure he initiated in Bulgaria has been terminated and that the decision to that effect was notified to him in absentia. The complainant maintains that, this being the case, the State party is mistaken in supposing that his asylum claim remains pending and that he is therefore not at risk of being detained. Given the termination of the asylum procedure, it is very likely that the complainant will be treated as an immigrant in an illegal situation immediately upon his return to Bulgaria and throughout the proceedings in his case.

5.5 The complainant also makes reference to the report of the European Council on Refugees and Exiles.[22] He maintains that the State party should have carried out a more thorough investigation into his status in Bulgaria so as to be able to evaluate his risk of detention in that country, given that several reports by NGOs, the United Nations and European judicial authorities have strongly criticized the conditions of detention to which asylum seekers are subjected there. The complainant observes that the State party has failed to investigate his case diligently and that its statement of facts is therefore incorrect. The complainant has moreover proved, on the basis of information obtained from the Bulgarian Helsinki Committee and other sources, notably the European Council on Refugees and Exiles report,[23] that he is at risk of being detained anew if transferred to Bulgaria. This being the case, he considers that the State party has violated his right to an effective remedy under articles 3 and 16 of the Convention.[24]

5.6 According to the complainant, the Federal Administrative Court did not conduct a proper analysis of the information on the situation in Bulgaria transmitted by him in support of his appeal. The Court was content to base its negative decision on the mere presumption that the European legal order was respected in Bulgaria, without making any reference whatever to factual data to refute the information provided by the complainant, which pointed to fundamental deficiencies in the reception conditions and asylum procedures. The Court concluded that "in the absence of any evidence of the systematic violation of minimum community standards in this regard, Bulgaria's respect for its obligations with regard to the rights of asylum seekers in its territory can be presumed" and that "in the case before it, the appellant has not demonstrated that the Bulgarian authorities would refuse to examine his application for protection". The complainant maintains that the Court's analysis clearly fails to satisfy the Committee's requirement of "[an] effective, independent and impartial review of the decision to expel or remove" and violates his right to an effective remedy.

5.7 The complainant emphasizes the inhuman and degrading conditions in the centres for asylum seekers, as well as the risk that he will not receive any support at all and will thus be reduced to living on the streets in a state of complete destitution.[25] Even if he is not detained, the complainant, who is suffering from serious mental-health problems, will either face the inhuman and degrading conditions in the reception centres for asylum seekers or else will find himself in a state of complete indigence on the streets, without

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[21] See the report prepared by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Bulgaria from 9 to 11 February 2015 (http://bit.ly/1GHj8EN), see also AIDA, Bulgaria Country Report, pp. 55–57.

[22] See European Council on Refugees and Exiles/European Legal Network on Asylum, Research Note: Reception conditions, detention and procedural safeguards for asylum seekers and content of international protection status in Bulgaria.

[23] Ibid.

[24] The complainant recalls that the Committee has confirmed on several occasions that the right to an effective remedy is inherent in the prohibition on torture and ill-treatment. For example, in the case of *Agiza v. Sweden* (CAT/C/34/D/233/2003, para. 13.7), the Committee held that "the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise". See also *A.S. v. Sweden* (CAT/C/25/D/149/1999), para. 8.6.

[25] See European Council on Refugees and Exiles/European Legal Network on Asylum, Research Note: Reception conditions, detention and procedural safeguards for asylum seekers and content of international protection status in Bulgaria, paras. 30 and 32.

access to housing and still less to medical care. His removal would thus breach article 16 of the Convention, even if he were not detained.

5.8 The complainant contests the State party's assertion that he has not presented any specific evidence to demonstrate that Bulgaria does not respect the principle of non-refoulement. In fact, the deficiencies of the Bulgarian asylum system are well known, including the lack of interpreters and other staff during registration and at hearings,[26] the lack of adequate legal representation and the failure to provide sufficient information on the status of cases.[27] It is thus by no means guaranteed that the complainant will have access to an equitable asylum procedure that respects the principle of non-refoulement. As stated in the European Council on Refugees and Exiles Research Note, in Bulgaria, access to an equitable asylum procedure is available only in theory. Furthermore, the complainant has cited official Bulgarian statistics demonstrating a 91 per cent rejection rate for applications from non-Syrian asylum seekers. More specifically, he emphasizes that the rejection rate for Afghans was 94 per cent in 2015. The Bulgarian Helsinki Committee has confirmed that applications from Afghan asylum seekers are overwhelmingly rejected. Lastly, with regard to the risk of chain refoulement, it is important to note that, in May 2016, Bulgaria ratified a readmission agreement with Turkey, under which Turkey is obliged to take back persons who have entered Bulgaria irregularly from Turkey. No information is available on the application of this agreement, but it is not inconceivable that the complainant will be expelled to Turkey, the country through which he travelled before entering Bulgaria.

5.9 Concerning the risk of ill-treatment in Bulgaria, the State party does not dispute that the living conditions in Bulgarian detention centres must be characterized as degrading. According to the State party, the complainant is not at risk of being detained again if transferred to Bulgaria and his risk of being subjected to ill-treatment in the context of detention is therefore not examined in the State party's observations. The Commissioner for Human Rights of the Council of Europe, after visiting Bulgaria in February 2015, criticized the fact that asylum seekers in Bulgaria were routinely and unlawfully placed in detention, described the living conditions in detention as substandard and denounced instances of ill-treatment in the detention centres.[28]

5.10 The complainant disputes the State party's analysis, which fails to acknowledge that he is especially vulnerable and according to which he has not shown that his living conditions in Bulgaria would be "so difficult or harsh" as to constitute treatment contrary to article 1 of the Convention or article 16. He argues that he must be considered a vulnerable asylum seeker, given that he suffered ill-treatment in Bulgaria in the past, requiring him to receive psychiatric treatment in Switzerland.

5.11 The State party's assertion that "at no stage of the asylum procedure in Switzerland did the complainant refer to any ill-treatment suffered in Bulgaria" and that it was "only in the complaint addressed to the Committee that he claims to have been subjected to various abuses on the part of State officials" is inaccurate and is contradicted by the documents on file, which show that the complainant did submit that he had been tortured during his detention in Bulgaria and had also endured inhuman and degrading conditions. During his summary hearing at the reception and processing centre in Basel, he made the following statements: "I was in prison for a year in Bulgaria. I experienced much torture ('Viel

[26] See AIDA, Bulgaria Country Report, and the European Union Fundamental Rights Agency, Weekly data collection on the situation of persons in need of international protection, Update 5, 26–30 October 2015 (http://bit.ly/1KQWp1S). See also UNHCR Bulgaria, Aktualisierte Antworten auf Fragen von UNHCR Deutschland im Zusammenhang mit Überstellungen nach dem Dublin-Verfahren, June 2015, p. 3.

[27] See "Bulgaria's jailing and criminalisation of refugees is 'inhumane', says UN" (www.independent.co.uk/news/world/europe/un-bulgaria-refugee-crisis-inhumane-jailing-prosecuting-a7185501.html).

[28] See the report by Nils Muižnieks. See also the September 2016 report of the European Programme for Integration and Migration and the Center for Legal Aid — Voice in Bulgaria, Who Gets Detained? Increasing the transparency and accountability of Bulgaria's detention practices of asylum seekers and migrants.

Folter')"[29] and "In prison, it was horrible and unhygienic. It was very dirty. We were only fed once a day. The food was so bad that even a donkey wouldn't touch it. We all had lice."[30] The complainant thus did signal both the torture and the inhuman and degrading conditions he had experienced while in detention in Bulgaria. The Swiss authorities did not trouble themselves to ask him for details of the allegations of torture or of the inhuman detention conditions; indeed, they did not ask him a single question on the matter during the entire asylum procedure. The fact that there are not more details or information on file cannot therefore be attributed to the complainant but rather to the State party authorities' manifest failure to investigate. This failure violates the obligation to conduct an effective, independent and impartial review of the decision to expel or remove. Logically, the fact that a complainant has already been subjected to acts of torture in the destination State is pertinent when it comes to analysing the risk of a future violation of the prohibition. The State party should have investigated that aspect of the case in order to be able to assess correctly the risk entailed by the complainant's removal.

5.12 With regard to the living conditions of vulnerable asylum seekers in Bulgaria, persons transferred there under the Dublin Regulation may not have access to housing, food or medical care. Given the lack of financial resources, the institutions have shortcomings. This situation is particularly worrying for vulnerable asylum seekers like the complainant. Concerning the State party's argument that Bulgaria is "a State governed by the rule of law with an operational police authority that is willing and able to offer adequate protection against assaults committed by third parties", it should be recalled that numerous NGO and United Nations reports as well as press articles have attested to violence on the part of the police, border guards, prison staff and members of the public against persons seeking protection in Bulgaria. Furthermore, the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, stated that Bulgaria was promoting intolerance. In December 2015, Amnesty International invited the Government of Bulgaria to investigate complaints by refugees and migrants of ill-treatment, violence and blackmail to which they had been subjected by the police. The State party is wrong to conclude that the complainant is not a vulnerable person and that it will be possible to meet his needs in Bulgaria. According to a judgment of the Stuttgart administrative court of 15 June 2015, access to medical care in Bulgaria is inadequate.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a complaint, the Committee must decide whether or not it is admissible under article 22 of the Convention.

6.2 The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.3 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it should not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party concedes that the complainant has exhausted all available domestic remedies.

6.4 The Committee notes that, in the present case, the State party disputes the admissibility of the complaint in respect of the claim under article 16 of the Convention. It takes note of the State party's argument that the obligations described in article 3 of the Convention do not encompass situations of ill-treatment envisaged in article 16 of the Convention and that, accordingly, the claim under article 16 is inadmissible *ratione materiae*, as incompatible with the provisions of the Convention. The Committee notes the

[29] It cannot be concluded from the information on file that the complainant was tortured during his stay in Bulgaria. The German-language record does not support the claims that he complained to the Swiss authorities of having been subjected to acts of torture in Bulgaria.

[30] Annex 1 of the State party's observations, record of the personal background interview, paras. 1.17.04 and 2.06 (French translation of the German original prepared by counsel).

complainant's arguments that the State party's analysis of the claim under article 16 is incorrect; that the prohibition on refoulement also covers ill-treatment; that his removal per se would constitute a violation of article 16, given his particular circumstances, notably the fact that he is suffering from depression and post-traumatic stress disorder; and that provision of the specialized medical treatment he is currently receiving in Switzerland would by no means be guaranteed if he were removed to Bulgaria. In this regard, the Committee considers that the complainant is relying on information of a general nature, without presenting specific evidence to support his allegations. In these circumstances, and in the absence of other pertinent information on file, the Committee concludes that the complainant has failed to sufficiently substantiate his claim under article 16 for the purpose of admissibility.

6.5 The Committee considers, however, that the arguments put forward by the complainant raise substantive issues under article 3 of the Convention, and that those arguments should be dealt with on the merits. Accordingly, as the Committee finds no further obstacles to admissibility, it declares the communication admissible under article 3 of the Convention.

Consideration of the merits

7.1 In accordance with article 22 (4) of the Convention, the Committee has considered the communication in the light of all the information made available to it by the parties.

7.2 In the present case, the issue before the Committee is whether the removal of the complainant to Bulgaria would constitute a violation of the State party's obligation under article 3 (1) of the Convention not to expel or to return ("refouler") a person to another State where there are substantial grounds for believing that he or she would risk being subjected to torture.

7.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon his return to Bulgaria. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The Committee recalls that the aim of that determination is to establish whether the individual concerned would personally be at a foreseeable and real risk of being tortured in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. Additional grounds must be adduced to show that the individual concerned would personally be at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture given his or her specific circumstances.[31]

7.4 The Committee recalls its general comment No. 1, wherein it states that the existence of a risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to be shown to be highly probable,[32] the Committee recalls that the burden of proof normally falls on the complainant, who must present an arguable case establishing that he or she is at foreseeable, real and personal risk.[33] The Committee further recalls that, in accordance with this general comment, it gives considerable weight to findings of fact that are made by the organs of the State party concerned but, at the same time, it is not bound by such findings and instead has the power,

[31] See, for example, *E.K.W. v. Finland* (CAT/C/54/D/490/2012), para. 9.3.

[32] See general comment No. 1, para. 6.

[33] Ibid. See also *A.R. v. Netherlands* (CAT/C/31/D/203/2002), para. 7.3; *Kalonzo v. Canada* (CAT/C/48/D/343/2008) para. 9.3; *X v. Denmark* (CAT/C/53/D/458/2011), para. 9.3; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 8.4.

under article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in each case.[14]

7.5 The complainant states that, in Bulgaria, he would not have access to asylum procedures and that he could be detained, ill-treated or tortured and subjected to refoulement to Afghanistan or transfer to Turkey. The Committee notes the complainant's assertion that he had problems with the guards in the detention centres in Bulgaria. The Committee further notes that the complainant's detention occurred when he was picked up by the police while in an irregular situation and before he had filed his application for asylum in Bulgaria. The Committee notes that the complainant himself affirms that he did not apply for asylum upon entering Bulgaria and that, consequently, it is likely that he was detained because he could be considered an illegal migrant. The Committee also notes that, after the authorities had registered his asylum application, he was released and transferred to housing for asylum seekers in Sofia. The Committee notes the State party's assertion that the complainant left Bulgaria, without waiting for a decision on his asylum application, because, according to him, Afghans were generally not welcome there and could not find work. He travelled through Hungary (where he filed asylum applications on 6 and 27 May 2015), Austria (where he also applied for asylum, on 2 August 2015) and Italy, before reaching Switzerland.

7.6 In the present case, the Committee notes the complainant's claim that his right to an effective remedy was violated because the State party did not respect its obligation to conduct an effective, independent and impartial review of the decision to remove him. The Committee notes that, according to the State party's observations, the State Secretariat for Migration and the Federal Administrative Court did not dispute, in their decisions, the fact of the complainant's detention or the insalubrious conditions alleged by him, but that he did not claim, contrary to the assertion in his communication, to have endured repeated physical assaults at the hands of the guards. The Committee also takes note of the State party's argument that the complainant has not shown that his living conditions in Bulgaria would be so difficult or harsh as to constitute treatment contrary to article 1 of the Convention or article 16. The Committee notes the complainant's assertion that the asylum procedure he initiated in Bulgaria has been terminated and that the decision to that effect was notified to him in absentia. The Committee notes, however, that the complainant learned this through contacts he reportedly had with the Bulgarian Helsinki Committee and that no pertinent document has been presented in support of the assertion. The Bulgarian authorities have expressly agreed to take back the complainant pursuant to article 18 (1) (b) of the Dublin III Regulation and, in so doing, have acknowledged that a procedure is under way in Bulgaria and have recognized their competence to process the asylum application. The Committee further notes that the complainant has not provided any details concerning his claims of torture.

7.7 The Committee notes the complainant's assertion that, owing to the ill-treatment to which he was subjected while detained in Bulgaria, he is suffering from severe depression and post-traumatic stress disorder and that, consequently, he is an exceptionally vulnerable person. The Committee further notes that, according to the State party, in view of the medical report produced, no very exceptional circumstances obtain in the present case and the state of health of the complainant does not constitute an obstacle under the Convention to his removal to Bulgaria. The Committee takes note of the State party's argument that the complainant, in the light of his personal situation and notwithstanding his medical problems, is not especially vulnerable and that it will be possible to meet his specific needs after his return to Bulgaria.

7.8 The Committee recalls that it must ascertain whether the complainant would currently run a risk of being subjected to torture in the event of removal to Bulgaria.[15] It notes that the complainant has had the opportunity to provide supporting evidence and more details about his claims, at the national level, to the State Secretariat for Migration and the Federal Administrative Court, but that the evidence provided was not such as to allow the

[14] See general comment No. 1, para. 9; *T.D. v. Switzerland* (CAT/C/46/D/375/2009), para. 8.7; and *Alp v. Denmark* (CAT/C/52/D/466/2011), para. 8.3.

[15] See, for example, *G.B.M. v. Sweden* (CAT/C/49/D/435/2010), para. 7.7.

national authorities to conclude that his status as an Afghan asylum seeker, the asylum proceedings in his case or the material and living conditions in the detention centres in Bulgaria would place him at risk of being subjected to torture upon his return.

7.9 Furthermore, the Committee recalls that the occurrence of human rights violations in the country of return is not, of itself, sufficient for it to conclude that a complainant is personally at risk of being tortured. On the basis of the information before it, the Committee concludes, in the present case, that the complainant has not provided proof that he was tortured in the past and concludes that the information that has been provided does not demonstrate that he would personally be at risk of torture if he were returned to Bulgaria.

8. In the light of the above, the Committee considers that the information submitted by the complainant is insufficient to substantiate his claim that he would be at a foreseeable, real and personal risk of torture if he were returned to Bulgaria.

9. Accordingly, the Committee, acting under article 22 (7) of the Convention, concludes that the complainant's removal to Bulgaria would not constitute a breach of article 3 of the Convention by the State party.